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No. 97-767

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

CASE CORPORATION, *Petitioner*,

v.

DANIEL FREEMAN, *Respondent*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Respondent's brief is most notable for what it does *not* say. In particular, respondent does not contest the following critical points:

- Whether *Daubert* applies to testimony about applied science is an important and recurring question, particularly in product liability actions. Pet. 22-23.

- An engineer's opinion concerning whether a product is defectively designed is "scientific" in nature. Pet. 11-12.

- Smith Reed's testimony was essential to any verdict for Freeman. Pet. 3.

- Reed offered no explanation as to how the documents upon which he purported to rely actually supported his opinion that the pedal configuration of the Case 1130 was defectively designed. Pet. 3-4, 18-19, 24-25, 29.

- Reed's "testing" had nothing to do with the alleged defect in the pedal configuration — namely, the proximity of the pedals allegedly giving rise to a risk of inadvertent co-engagement. Pet. 4, 18.

- Case's *Daubert*-based challenge to Reed's testimony attacked deficiencies in his analysis, not his conclusions. Pet. 24, 29.

It is thus undisputed that the $3.8 million verdict here rests entirely on the testimony of a single expert, and the only data on which the expert relied — documents and testing for a *different type* of defect — are completely unrelated to the purported defect on which the Fourth Circuit upheld respondent's claim.

Instead of coming to grips with any of these issues, respondent resorts to a combination of diversionary arguments about irrelevant factual matters and strained efforts to evade or explain away the serious intercircuit conflicts on the important questions presented in

the petition. These arguments are unavailing. Further review by this Court is obviously warranted.

1. Respondent's effort to distract the Court begins almost immediately, with accusations that the petition "misstates" and "mischaracterizes" certain facts concerning the accident in which respondent was injured. Opp. 1 n.1. These facts, however, have no relevance whatsoever to the questions presented in the petition or to whether further review should be granted. In any event, respondent's accusations are manifestly untrue.[1]

In another diversionary tactic, respondent incorporates into his discussion of the expert testimony presented at trial a substantial amount of factual material that similarly has no bearing at all on the questions presented for this Court's review. The most glaring example is respondent's devoting more of his brief to attacking Case's experts (Opp. 5-7) than to defending his own. These arguments are doubly irrelevant because (a) the propriety of judgment as a matter of law for Case in no way depended on the testimony of its experts, and (b) Freeman did not appeal the district court's decision to admit the testimony of Case's experts. Respondent also devotes considerable space to discussing aspects of his own expert's testimony that are not at issue here. Reed's much-trumpeted *qualifications* (Opp. 4, 14-15) have never been contested by Case, and his testimony regarding the feasibility of and standards applicable to the operator presence control ("OPC") (*id.* at 8, 15) is not germane because the Fourth Circuit

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[1] Respondent's insistence that Case misidentified the object that Freeman struck with his tractor as a "boulder" (instead of a "rock"), "[i]n an attempt to falsely portray Freeman's actions as unreasonable," Opp. 2, overlooks the fact that both the district court and the court of appeals described the object as a "partially buried *boulder*." Pet. App. 18a, 2a (emphasis added). And respondent's objection to Case's short-hand description of the action as resulting from a "roll-over" accident, Opp. 2, is inconsistent with respondent's own brief, which states that his injuries occurred when his tractor "unexpectedly lunged forward and *rolled over* an embankment." *Id.* at 1 (emphasis added).

based its decision entirely on the purported pedal defect. Pet. App. 6a n.3.

Respondent's focus on the irrelevant is telling. Indeed, as demonstrated below, the weak arguments advanced by respondent in an effort to dissuade this Court from granting certiorari on the first question — whether *Daubert* may be bypassed completely when an expert testifies about the application of scientific knowledge but purports to rely only on "experience" or "training" rather than on any "methodology" — simply confirm the importance of this question, which was squarely decided by the Fourth Circuit in accord with the approach of three other circuits but in conflict with six other circuits. As for the second question presented — whether *Daubert*'s command that courts focus not on "conclusions" but on "principles and methodology" precludes examination of the reasoning that connects the expert's hypothesis to his or her conclusion — respondent essentially provides no response at all, let alone a defense of the Fourth Circuit's holding, which, once again, conflicts with the decisions of several other circuits.

2. In arguing against further review of the first question presented, respondent presents four principal contentions. None is even remotely persuasive.

a. Respondent first insists that "jurisdictional irregularities" occasioned by Case's failure to cross-appeal the district court's *Daubert* ruling require denial of Case's petition. Opp. 9-11. This argument is frivolous. As respondent well knows, the district court granted judgment as a matter of law for Case, Pet. App. 48a, thus awarding Case the full measure of relief that it sought. It is well settled that "only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). Thus, as respondent's own cases explain, "[w]ithout a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in

the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it.'" *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); accord *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994).

b. Respondent next contends that this case is an inappropriate vehicle for resolving important *Daubert* questions because the Fourth Circuit "did not address" and "never decided" the issues raised in Case's petition. Opp. 11-13. This, too, is an absurd argument. The court of appeals expressly "affirm[ed] the district court's rejection of the *Daubert* challenge * * * albeit on somewhat different grounds," holding that *Daubert* simply does not apply "[i]n cases like this one, where an expert relies on his experience and training and not a particular methodology to reach his conclusions." Pet. App. 9a-10a n.6 (citing *Compton* v. *Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), cert. denied, 117 S. Ct. 611 (1996)). Respondent's suggestion that the court of appeals did not reach an issue that it explicitly "affirm[ed]" is plainly untenable.[2]

Respondent's related contention that the court of appeals' pronouncement on Case's "*Daubert* challenge" is not a "holding" likewise is without merit. Nowhere in its discussion did the court suggest that its ruling was either unnecessary to the decision[3] or somehow without precedential effect. To the contrary, the rule that

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[2] To be sure, as respondent notes (Opp. 12), the court of appeals did not decide whether *Daubert* applies generally outside the scientific context. See Pet. App. 9a n.6. But this is because the court held that *Daubert* does not apply when, as here, an expert relies solely on his experience and training. *Id.*

[3] In fact, the court considered only Reed's testimony in deciding whether respondent "present[ed] sufficient evidence that the pedal configuration and attendant hazard constituted an unreasonably dangerous design defect." Pet. App. 8a. Reed was the only expert who could have provided such evidence.

Daubert is inapplicable when experts rely on experience and training rather than methodology is now the law of the Fourth Circuit (and of several other circuits).[4]

Finally, respondent's intimation that resolution of the *Daubert* issues here would require examination of a voluminous record (Opp. 13) is yet another smokescreen. Respondent's only expert on the issue of the purported design defect in the pedal configuration was Reed, and as noted above, it is undisputed that the only bases for his opinion — the documents he reviewed and the "testing" he performed — have nothing at all to do with the purported defect upon which the Fourth Circuit's judgment rests: the risk that the brake and SRC pedals "could easily be inadvertently coengaged." Pet. App. 7a.

c. Next, respondent argues that certiorari should be denied because "Reed's testimony would survive appellate scrutiny in any circuit." Opp. 16. This is not true; although Reed's testimony would be admitted in the Second, Fourth, Ninth, and Tenth Circuits, it would be excluded in the Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits. Pet. 13-15. In seeking to render Reed's testimony plausible, respondent spends most of this short section of his brief (pp. 14-17) discussing Reed's qualifications (*id.* at 14), his testimony concerning the OPC (*id.* at 15), and Case's experts (*id.* at 17) — none of which has anything to do with the outcome below or the questions presented for this Court's consideration. The issue here

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[4] In any event, as respondent concedes (Opp. 12), a grant of certiorari is precluded "only when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Here it was both. Case pressed its *Daubert* concerns in the district court in a motion in limine and again in its motion for judgment as a matter of law. Then, even though Case obtained full relief in the district court, it again pressed the issue in the Fourth Circuit as an alternative ground for affirmance. See Pet. C.A. Br. 23-27. Case's *Daubert* argument has been passed upon (against it) every time it has been raised. See Pet. App. 50a-57a (motion in limine); Pet. App. 29a-31a (judgment as a matter of law); Pet. App. 9a-10a n.6 (court of appeals).

involves the flaws in Reed's *methodology* and the total absence of connective reasoning supporting his opinion that the pedal configuration of the Case 1130 was defectively designed. In a discussion that consumes just one page of his brief, respondent offers nothing but conclusory statements about Reed's qualifications and so-called "testing," which, according to respondent, "satisfied even the most stringent applications of *Daubert*." *Id.* at 16. Notably, respondent makes no effort to controvert Case's summary of the methodological flaws in Reed's testimony. See Pet. 3-4, 18-19, 24-25, 29. This silence speaks volumes, particularly in view of respondent's detailed expositions of the irrelevant matters noted above.

Respondent's assertion that Reed's testimony satisfied *Daubert* rests entirely on his assessment of just one of the factors set forth by this Court — testing performed by Reed that supposedly "verified his opinions." Opp. 16. But as Case pointed out (Pet. 4), the record amply demonstrates that these rudimentary "tests," were not the kind of controlled, analytical experiments that are the hallmark of good science. Bert Black, et al., *The Law Of Expert Testimony — A Post-Daubert Analysis, in* EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 45 (Bert Black and Patrick W. Lee, eds., 1997) ("The variety and severity of the tests at issue in any given case must be considered in applying the Court's testing factor"). Even more fundamentally, Reed's tests examined the wrong question. All that Reed could have hoped to have determined from his testing was whether the pedals *could be* activated simultaneously — an issue that Case conceded. In fact, Reed's testing established only that it is "plausible" to *deliberately* contact the two pedals at the same time. C.A. App. 668-669. Reed did not, however, conduct *any* tests on the question at issue: whether the risk of *inadvertent* co-engagement was sufficiently likely to pose an unreasonable danger.[5]

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[5] Respondent has never disputed, in the trial court, court of appeals, or in his brief in opposition, that the controlled testing of inadvertent pedal coengagement introduced at trial by Case, Pet. 4 n.3, involved a pedal arrangement virtually identical to the Case 1130. Nor has respondent

In short, Reed's testimony cannot even satisfy the first *Daubert* factor, let alone any of the remaining factors that would be applied in the majority of other circuits. See, *e.g.*, *Dancy* v. *Hyster Co.*, 127 F.3d 649, 652 (8th Cir. 1997); *Smelser* v. *Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir.), cert. denied, 118 S. Ct. 67 (1997); *Deimer* v. *Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir. 1995). Nor has Reed provided any other support (*e.g.*, relevant literature or industry standards) for his opinion on the pedal configuration, let alone an explanation of the reasoning necessary to transform a hypothesis into an opinion, as would be required by a majority of circuits. As a result, Reed's opinion was nothing more than a restatement of an untested hypothesis.

d. Respondent finally insists that the split among the circuits on this issue does not require this Court's attention because it amounts to only "slightly different ways" of undertaking the "flexible" inquiry mandated by *Daubert*. Opp. 17-24. As explained in Case's petition, and briefly reiterated below, respondent's view has been effectively rebutted by the remarks of numerous courts and commentators pointing to the deeply divergent majority and minority approaches. See Pet. 13-21; see also Michael Hoenig, *Developments Concerning Experts*, N.Y. LAW J. 3, 7 (Nov. 10, 1997) (noting that the dispute over whether *Daubert* applies to applied science "clearly is heating up" in the circuits, and "is nothing less than a fundamental conflict

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challenged the results of that testing, which showed that (a) inadvertent misapplication occurred at approximately the same rate (.2%) at which automobile drivers inadvertently misapply the accelerator and brake pedals, and (b) at no time in the testing, which involved more than 1,100 test drives, was there any significant application of both pedals. C.A. App. 833-835, 842-843, 2119. In contrast, Reed made no inquiry into the probability of mishaps occurring, even though that is an important factor that engineers weigh in designing safety features. Cf. *Braun v. Lorillard, Inc.*, 84 F.3d 230, 234 (7th Cir.) (Posner, C.J.) (under *Daubert*, "the district court is responsible for making sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work"), cert. denied, 117 S. Ct. 480 (1996).

going to the heart of how *Daubert* should influence trial court gatekeeping duties"). Notwithstanding respondent's attempt to evade the issue, the conflict is deep, mature, and in need of resolution by this Court.

Before getting to the circuit conflict, respondent takes an extended detour through the law of evidence in the Fourth Circuit. Opp. 17-20. This is yet another distraction; Case's petition is premised on the existence of a *inter*circuit, not an *intra*circuit, conflict. In any event, there is no conflict within the Fourth Circuit with regard to the questions presented here. All but one of the cases cited by respondent preceded this case, and the one post-*Freeman* case — *Brown* v. *Auto-Owners Ins. Co.*, 121 F.3d 697, 1997 WL 547975 (4th Cir. Sept. 8, 1997) — is unpublished, and therefore of no precedential value.[6] Moreover, none of the cases, either before or after *Freeman*, involved a "case[] like this one," in which an expert seeking to testify on aspects of applied science "relie[d] on his experience and training and not a particular methodology to reach his conclusions." Pet. App. 9a n.6. Thus, in *Freeman* itself, the Fourth Circuit treated the *Daubert* question as one of first impression in the circuit. The court did not even mention, much less rely on, any of the Fourth Circuit cases cited in respondent's brief. Rather, the court looked to the decisions of other courts of appeals and chose to follow the approach of the Tenth Circuit in *Compton*. There is no doubt that *Freeman* is the law of the Fourth Circuit on the issues presented here.

Respondent's suggestion that all of the circuits exhibit "a remarkable degree of similarity" (Opp. 19) in applying *Daubert* — that the split in the circuits "is more one of semantics than substance" (*id.* at 20) — is wishful thinking in the extreme. This Court need not take Case's word on the depth and severity of this division; courts and commentators have remarked repeatedly on it over the past year

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[6] *Brown* involved an expert whose proffered testimony based on "personal observations" was excluded in a decision that explicitly applied *Daubert*. 1997 WL 547975, at *1. The order contains no discussion of *Freeman*, let alone any hint of a conflict between the two decisions.

or so since the Court denied certiorari in *Compton*. See Pet. 19-21; see also Hoenig, *supra*, N.Y. LAW J. at 7 ("Notwithstanding strong anti-*Compton* sentiments, some courts seem to be endorsing the purported distinction between science and 'applied science,' technical experience or training"; citing the Fourth Circuit's decision in the instant case and the Ninth Circuit's in *McKendall* v. *Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997), as the leading examples). Moreover, the terms used to describe the approach of the court of appeals here (and the Second, Ninth, and Tenth Circuits) — see, *e.g.*, *Watkins* v. *Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (describing this approach as "exactly backwards" and "untenable"); Jennifer Laser, Note, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Phamaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379, 1409 (1997) (stating that this approach "turn[s] *Daubert* on its head") — indicate a deep divide on the substance of the *Daubert* inquiry. Simply put, one cannot set the *Freeman* and *Compton* opinions alongside of, for example, *Watkins*, *Cummins* v. *Lyle Indus.*, 93 F.3d 362, 367-368 (7th Cir. 1996), and *Peitzmeier* v. *Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997), and seriously contend that the former approach "closely resembles" (Opp. 24) the latter.

Finally, any "flexibility" in the majority approach with respect to particular *Daubert* factors (Opp. 17, 20, 24) does not extend to the basic *Daubert* premises that expert testimony involving engineering and other applied sciences must be a reliable product of valid reasoning from hypothesis to a conclusion that is relevant to an issue in the case. This is, in fact, the core of the rigorous inquiry demanded by *Daubert*, and it is notably absent from the approach of circuits that have eschewed *Daubert* in the applied science context.

Whether experts who cannot or will not explain the reasoning or methodology underlying their opinions may testify in court is a matter of vital importance in product liability litigation in this country. Pet. 22-23; see also Brief of the Chemical Manufacturers Association as *Amicus Curiae* 2-3, 5. This Court's review is plainly

warranted to resolve the otherwise intractable split among the circuits on this critical issue.

3. Respondent's two-sentence reply to Case's second question presented is no answer at all. Case does not dispute that the courts of appeals have endeavored to follow this Court's directive distinguishing between "principles and methodology" on the one hand, and "conclusions" on the other. *Daubert*, 509 U.S. at 595. But this simply begs the question. As noted in Case's petition (Pet. 23-30), the circuits are in obvious disagreement as to where the line separating the two should be drawn. A number of courts of appeals — including at least the Third, Fifth, and Seventh Circuits — have recognized that "in the context of *Daubert* the word 'methodology' has to mean the entire pattern of reasoning through which a conclusion is reached." Black, et al., *supra*, at 24 & n.56 (also noting that "methodology" is defined as "the processes, techniques, or approaches employed in the solution of a problem or in doing something"); see also Clifton T. Hutchinson & Danny S. Ashby, *Daubert v. Merrell Dow Pharm., Inc.: Redefining the Bases for Admissibility of Expert Scientific Testimony*, 15 CARDOZO L. REV. 1875, 1886 (1994) ("[I]t is *how* conclusions are reached, not *what* the conclusions are, that makes them 'good science'"). By contrast, the Fourth Circuit in this case (like the Eleventh Circuit, see Pet. 25-26) viewed objections to an expert's "analysis" as challenges to his conclusions, not his methodology. Thus, despite the fact that respondent cannot in hindsight offer even an explanation, let alone a defense, of Reed's "reasoning," the court of appeals deemed his testimony admissible and sufficient to uphold a multi-million dollar verdict. Reed's testimony plainly would have been excluded in the Third, Fifth, and Seventh Circuits. See Pet. 27-29 (collecting cases).

The divergent approaches of the courts of appeals to this Court's methodology/conclusions distinction, under which challenges to an expert's "analysis" are admissibility determinations in some circuits but jury questions in others, present a well-developed and frequently encountered conflict ripe for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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